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June 10, 2011

VIA ELECTRONIC AND FIRST CLASS MAIL

Lester A. Heltzer Executive Secretary National Labor Relations Board 1099 14th Street, NW, Room 11602 Washington, D.C. 20570

Re: In re: Quality Roofing Supply Company, Cases 4-CA-36952, et al.

Dear Mr. Heltzer:

We write in opposition to the Charging Party's Special Appeal of Administrative Law Judge Michael Rosas' decision granting Respondent's Petition to Revoke the Subpoena to Quality's Chairman of the Board Robert R. Buck. The ALJ found that the Charging Party failed to effectuate proper service on Mr. Buck. The Charging Party's purported "Special Appeal" is a cursory and vexatious attempt to circumvent the rules governing these proceedings and should accordingly be rejected for several reasons.

First, in filing this appeal, the Charging Party failed to comply with the NLRB rules. The rules makes clear that the proper procedure for objecting to ALJ rulings is through post-decision exceptions – not through a special appeal. In rare cases, a party may request special permission to file an interlocutory appeal, but in doing so, must explain why an interlocutory appeal is necessary. Rule 102.26. Here, rather than request permission as required, the Charging Party simply filed its appeal on an issue of no special importance or urgency. This appeal concerns the question of the Charging Party's improper service of a subpoena to Mr. Buck. The Charging Party easily could have remedied the service defect at any time since the Respondent filed its petition to revoke on May 6, 2011 or the ALJ's initial ruling on May 10, 2011. Indeed, the ALJ expressly informed Charging Party on May 10, 2011, the first day of the hearing, that Charging Party could make another attempt to serve Mr. Buck and that Charging Party could drop the subpoena off at Mr. Buck's place of business. Thus, a remedy remains uniquely within the Charging Party's control, as the hearing is ongoing and likely will continue for weeks. The Charging Party's Special Appeal should therefore be rejected on this basis alone.

<u>Second</u>, the Charging Party's appeal should also be rejected because it fails to establish any valid basis for overturning the ALJ's decision granting Respondent's Petition to Revoke the



Subpoena. The Charging Party admits that it did <u>not</u> effect proper service of the subpoena upon the intended recipient, Mr. Buck, by certified mail – or any of the other methods of service identified in the rules – as required. Rather, the Charging Party contends that the attempted, but refused, service upon Mr. Buck's spouse is somehow sufficient. None of the cases cited in the Charging Party's appeal provides controlling authority for such a proposition. Rather, those cases stand for nothing more than the unremarkable notion that when the actual intended recipient receives or refuses a certified mail delivery that person cannot claim lack of service, and the Charging Party's reliance on them is therefore misplaced. In *SMC Engineering & Contracting, Inc.*, 324 NLRB 341 (1997), for example, service was properly effected on the company president – an individual who was plainly authorized to accept such service (*i.e.*, service was effected on the president himself, not his wife). Moreover, the serving party in *SMC Engineering* made repeated attempts to correct the defects in service of which it became aware, such as with respect to the correct name of the entity and proper address for service. By contrast, the Charging Party in this case has made no effort to re-attempt service on Mr. Buck, despite the express guidance provided by the ALJ and various methods of service set forth in the NLRB rules.¹

The other cases cited in the Charging Party's Special Appeal likewise are inapposite. In *Michigan Expediting Service*, 282 NLRB 210 (1986), the purportedly "refused" service had been properly effected on the parties specifically named in the charges and complaint (*i.e.*, the respondents). And in *DaVinci Fashion, Inc.*, 286 NLRB 809 (1987), the attempted service by mail was apparently refused either by one of the two owners of the company (a husband and wife), who were plainly authorized to accept service on its behalf, or an employee who was authorized to access the company's secured post office mailbox – facts which can easily be distinguished from the present circumstances of the Charging Party's attempted service on Mr. Buck's spouse at his home.

Charging Party cites no case (and we are aware of none) in which an individual who is not the named party or an agent authorized to accept service on the party's behalf refused delivery, but service was nonetheless deemed proper on the party. Indeed, Rule 102.113 specifies that service may be made "upon the recipient" by certified mail or registered mail. That plainly was not done in this case, as demonstrated through Mr. Buck's declaration submitted in support of Respondent's Petition to Revoke.

<u>Third</u>, even if the Board were to accept the Charging Party's appeal of the ALJ's ruling on the deficient service, the subpoena to Mr. Buck should nonetheless be revoked by the ALJ for the reasons stated and legal authorities cited in Respondent's Petition to Revoke and supporting documents. The subpoena is a transparent attempt to harass Respondent by seeking the testimony of the top official at Respondent's parent company, who, as the Charging Party is already well

Similarly, in *Best Western City View Motor Inn*, 327 NLRB 468 (1999), the subpoena was served by certified mail, return receipt requested, on the individual named in the subpoena at his last known address.



aware, has no connection whatsoever to this case. To grant the special appeal would be futile as the subpoena is defective for other reasons.

Rather than simply making another effort to effect proper service of the subpoena on Mr. Buck and tender the witness fee (which Mr. Buck still has not received) as required, the Charging Party has sought to increase Respondent's expense by launching this purported "Special Appeal." The Charging Party's gambit should be rejected outright.

Thank you for your consideration.

Very truly yours,

SEYFARTH SHAW LLP

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Peter Chatilovicz

cc: Jennifer Spector, Esq. (via electronic mail)

Lou Agre, Esq. (via electronic mail)

The Honorable Michael Rosas (via electronic mail)